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Molen v. Christian Appellant's Reply Brief Dckt. 43755

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL SCOTT MOLEN,

Appellant / Plaintiff,

v.

RONALD D. CHRISTIAN,

Respondent / Defendant.

Supreme Ct. Docket No. 43755
Ada County No. CV-2015-3024

APPELLANT-PLAINTIFF'S
REPLY BRIEF

APPEALED FROM THE FOURTH JUDICIAL DISTRICT
THE HONORABLE LYNN G. NORTON PRESIDED

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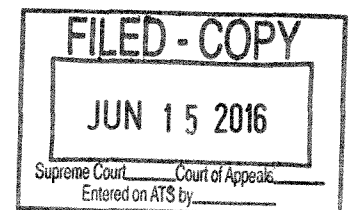


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INTRODUCTION

In this brief, Appellant-Plaintiff Michael Scott Molen (“Molen”) addresses issues in Reply to Respondent’s Brief. Any issues raised in his opening brief, but not further addressed below, should not be deemed waived or forfeited. Molen respectfully requests this Court reverse the district court’s Order Granting Respondent’s Motion for Summary Judgment.

ARGUMENT

I. Respondent’s Request For Attorney Fees Should Be Denied

In Respondent’s Brief, Respondent-Defendant Ronald D. Christian (“Christian”), fails to provide a basis for an award of fees on appeal. *See* Respondent’s Brief, p. 5. There is no argument or citation to authority supporting the basis for an award of attorney fees. *See Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 874 (1999) (ruling “[w]here a party requesting attorney fees on appeal cites the applicable statutes but does not present argument with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied on, we will not address the request.”); *Carroll v. MBNA Am. Bank*, 148 Idaho 261, 270 (2009) (ruling to be entitled to attorney fees on appeal, authority and argument establishing a right to fees must be presented in the first brief filed, mere citation to statute or rules is insufficient).

Second, Molen is requesting this Court to resolve an issue of first impression in this case. Cases of first impression do not constitute an area of settled law and therefore an award of attorney fees is not appropriate. *See Purco Fleet Services, Inc. v. Idaho State*

Dept. of Finance, 140 Idaho 121, 126-27 (2004). For these reasons, the Court should not entertain or consider awarding Christian attorney fees in this case.

II. Actual Innocence Is Not An Element Of Criminal Malpractice Cause Of Action And Idaho Case Law Does Not Preclude This Court From Adopting The Exoneration Rule

The decision in *Lamb v. Manweiler* does not require that a plaintiff in a criminal malpractice cases prove the additional element of actual innocence. Further, *Lamb* does not preclude this Court from adopting the exoneration rule. In fact, the decision in *Lamb* strongly supports adoption of the “exoneration rule,” as discussed in Molen’s Opening Brief. In this case, there was no objective proof of some actual damage until Molen obtained post-conviction relief.

Yet, Christian argues that this Court’s decision in *Lamb v. Manweiler*, 129 Idaho 269 (1996), established that actual innocence is a required element in a criminal legal malpractice case. Respondent’s Brief, pp. 5-8. This was the position Christian repeatedly urged the district court to acknowledge, but the district court repeatedly declined.

After hearing on Christian’s Motion to Dismiss on April 9, 2015, Christian filed a Supplemental Authority in Support of Defendant’s Motion to Dismiss, attaching the *Lamb v. Manweiler* opinion. (R, pp. 74-81). In its Order Denying Motion to Dismiss, the district court found *Lamb* “does not identify actual innocence as an element of a legal malpractice action arising from representation in a criminal case – it just says that element was not in dispute in *Lamb*.” (R, p. 87). Next, Christian filed his Motion for Summary Judgment, the memorandum focused mostly on the procedural history of the *Lamb* case. (R., pp. 250-58). In its Memorandum Decision and Order Granting Summary Judgment, the district court stated:

The Court does not view *Lamb* as indicating the Idaho Supreme Court has adopted actual innocence as an element of a criminal legal malpractice claim. The entire statement in *Lamb* . . . is dicta without analysis. The parties in *Lamb* essentially stipulated to an extra element for a legal malpractice case and such stipulation has not happened in this case.”

(R., p. 357). Once again, Christian fails to recognize that *Lamb* simply does not stand for the proposition that “actual innocence” is an additional element of a criminal legal malpractice claim.

While Christian is correct that the Idaho Court of Appeals held that actual innocence is an additional element that a plaintiff must prove in a criminal legal malpractice case, *See* Respondent’s Motion to Augment Record, Ex. A (“A.R”), p. 6., the Idaho Supreme Court did not confirm, affirm, or even address the Idaho Court of Appeals’ holding on that issue. Rather, the Court’s decision in *Lamb* effectively vacated the Idaho Court of Appeals opinion. In fact, the Court’s decision was based on the element of proximate cause, not actual innocence. After reviewing the record of Lamb’s change of plea hearing the Court ruled:

From the transcript of the pleas it is clear that [Lamb] knew the elements and knew the facts. He knew that he might have a defense to the charges before he pled guilty. He also knew the choice of whether to plead guilty was his, not that of his attorney. The choices he had were explained by the district judge and acknowledged by Mr. Lamb. The proximate cause of any damage he may have suffered is the decision to plead guilty following a thorough advice of rights by the district judge concerning the charge.

Lamb, 129 Idaho at 274. Thus, the Court affirmed the district court’s decision granting summary judgment to Manweiler, but based its decision on different reasoning.

In contrast to the Idaho Supreme Court’s reasoning, both the district court and the Court of Appeals focused on the stipulated element of actual innocence. In its opinion, the district court held that the sole issue before it, which the parties stipulated, was whether

Lamb was guilty of the underlying charges. If Lamb were guilty, the element of proximate cause could not be established. *Lamb*, 129 at 271; (R., p. 175). After a review of the record, the district court held that Lamb failed to come forward with sufficient evidence to rebut his admissions of guilt and granted Manweiler's motion for summary judgment. *Id.* On appeal, the Idaho Court of Appeals noted that the inclusion of actual innocence as an additional element was not disputed by Lamb, at the district court level or on appeal. (R., p. 149). However, the Court of Appeals ruled *sua sponte* that actual innocence was an additional element. A.R., p. 6. The Court of Appeals found that affidavits attached to Lamb's post-conviction proceeding set forth facts that controverted Lamb's guilt and created a genuine issue of fact concerning Lamb's actual innocence. *Id.* at pp. 9-11.

A review of the three Lamb decisions above demonstrates that the Idaho Supreme Court did not confirm that actual innocence is an additional element in a criminal legal malpractice case. All three courts based their decisions on distinct reasoning. The district court ruled that Lamb failed to establish a genuine issue of fact concerning his innocence, and therefore he could not establish the proximate cause element. The Court of Appeals ruled that the record contained an issue of material fact concerning Lamb's actual innocence, and noted without addressing, that proximate cause is a distinct element. The Idaho Supreme Court did not engage in any discussion of Lamb's guilt or innocence, and only noted that the element of actual innocence was not in dispute. The Court based its decision specifically on the element of proximate cause ("The proximate cause of any damage he may have suffered is the decision to plead guilty . . ."). Thus, Christian's interpretation of *Lamb v. Manweiler* is incorrect.

Despite Christian's assertion, the Idaho Supreme Court did not confirm or affirm that actual innocence is an element in a criminal malpractice case. Molen submits that actual innocence is not an element of a criminal malpractice cause of action.

Similar to Christian's assertion that the Idaho Supreme Court confirmed that actual innocence is an element of a criminal legal malpractice suit, he contends that the Court "considered but did not adopt the exoneration rule" advanced by Manweiler in his petition to the Idaho Supreme Court. Respondent's Brief, p. 15. While it is correct that Manweiler argued for the Court to adopt an exoneration rule, just like the actual innocence element, the Court did not address the exoneration rule in its decision. That is because the Court made its ruling specifically on the element of proximate cause. More importantly, Manweiler raised the exoneration rule issue for the first time in his petition to the Idaho Supreme Court. (R., p. 227) ("This defense was not raised as an affirmative defense in [Manweiler's] answer to the complaint . . . nor at the summary judgment proceedings . . . nor, until now, has it been raised as an issue on appeal."). Thus, it was not an issue properly before the Court in *Lamb*, and Christian's assertion that the Court considered but did not adopt the exoneration rule is not supported by the facts in that case.

Next, Christian suggests that an actual innocence requirement and an exoneration requirement are mutually exclusive. In his brief he states:

The distinction is, states such as Idaho require actual innocence as an element of proof in an attorney malpractice case, and states that follow the exoneration rule require a showing of 'legal' innocence prior to allowing a plaintiff to proceed with a malpractice action; thus, exoneration is an element of proof in an attorney malpractice case in those states.

Respondent's Brief, p. 15. Even assuming *arguendo* that actual innocence is an element of a criminal legal malpractice case, which Molen disputes, the adoption of an actual

innocence element does not preclude a requirement of exoneration. Multiple jurisdictions have held that proof of actual innocence and legal innocence (exoneration) are required in criminal legal malpractice cases. *See e.g. Levine v. Kling*, 123 F.3d 580 (7th Cir. 1997) (applying Illinois law); *Shaw v. State Dep't of Admin.*, 816 P.2d 1358 (Alaska 1991) (requiring proof of legal innocence); *Shaw v. State Dep't of Admin.*, 861 P.2d 566 (Alaska 1993) (requiring actual innocence); *Therrien v. Sullivan*, 891 A.2d 560 (N.H. 2006). In fact, in arguing that this Court should adopt the additional element of actual innocence, Christian quotes language from *Falkner v. Foshaug*, 29 P.3d 771 (2001). Respondent's Brief, p. 14. In *Falkner*, the Court of Appeals of Washington held that "both a successful postconviction challenge and proof of innocence are necessary to maintain a criminal malpractice claim." *Id.* at 773.

Based upon the above, Molen submits that the decision in *Lamb v. Manweiler* does not require that a plaintiff in a criminal malpractice cases prove the additional element of actual innocence. Further, the decision in *Lamb* does not preclude this Court from adopting the exoneration rule.

III. Molen's Cause Of Action Did Not Accrue Until He Was Granted Post-Conviction Relief

Molen maintains his position that his cause of action against Christian did not accrue until Molen was granted post-conviction relief on June 17, 2014. Molen filed his Complaint on February 17, 2015, which is within the applicable statute of limitations.

Christian contends that Molen had objective proof of damage when he was convicted and sentenced in his criminal case. Respondent's Brief, p. 17. According to Christian, "Molen had been asserting that Mr. Christian's actions – those actions on which Judge Owen's post-conviction relief was granted – caused him damage, since the time he

was convicted in 2007” *Id.* Thus, according to Christian, Judge Owen’s ruling granting Molen post-conviction relief based upon Christian’s ineffective assistance has no bearing on this professional malpractice case because his ruling does not speak to when Molen suffered damages or whether Molen is actually innocent. Christian’s analysis is incorrect.

First, Molen has consistently maintained and asserted his actual innocence of the crime and that Christian’s ineffective assistance resulted in Molen’s conviction. That is to say, Molen was aware of Christian’s negligent acts prior to being granted post-conviction relief by Judge Owen. However, as the district court correctly stated: “it is not necessarily just the negligent act of the attorney which starts the accrual of the statute of limitations. There may be some external act after the fact which actually starts accrual.” (R., p. 92). (quoting and analyzing *Minnick v. Hawley Troxell Ennis & Hawley, LLP*, 157 Idaho 863, 868 (2015)).

Second, Judge Owen’s decision granting Molen’s petition for post-conviction relief has substantial bearing on this case. When Judge Owen granted Molen’s petition Molen had established his legal innocence of the crime. Molen’s action for criminal legal malpractice did not accrue, for statute of limitations purposes, until he successfully obtained post-conviction relief. Prior to that date, there was no objective proof of some actual damage. *See Stevens v. Bispham*, 316 Or. 221 (1992). As recognized by the district court, (R., p. 6; R., p. 354), the exoneration rule is an issue of first impression in Idaho.

In this case, there was no objective proof of some actual damage until Molen obtained post-conviction relief. This is within the two year statute of limitations. Therefore, Molen submits that a material issue of fact exists in this case concerning the date he obtained objective proof of some actual damage.

CONCLUSION

Based on the foregoing, Molen respectfully requests this Court reverse the district court's Order Granting Christian's Motion for Summary Judgment.

Dated this 13th day of June, 2016

MASSOTH & BURROWS

 For:
ELISA G. MASSOTH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of June, 2016, I caused to be served, by the method(s) as indicated, a true and correct copy of the foregoing upon:

Michelle R. Points
Attorney at Law
420 W. Main, Ste. 206
Boise, ID 83702

- ☒ U.S. Mail
☐ Hand Delivery
☐ Federal Express
☐ Facsimile (208-336-2088)

 For:
ELISA G. MASSOTH